STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED February 20, 2007
v	No. 265275 Oakland Circuit Court
ROBERT WILLIAM BELCOURT, Defendant-Appellant.	LC No. 2004-196766-FC

Before: Cavanagh, P.J., and Murphy and Meter, JJ.

PER CURIAM.

Following a jury trial, defendant was convicted of first-degree criminal sexual conduct, MCL 750.520b(1)(b), second-degree criminal sexual conduct, MCL 750.520c(1)(b), third-degree criminal sexual conduct, MCL 750.520d(1)(d), fourth-degree criminal sexual conduct, MCL 750.520e(1)(a), and two counts of assault with intent to commit second-degree criminal sexual conduct, MCL 750.520g(2).[1] He was sentenced to concurrent prison terms of fifteen to fifty years for the first-degree CSC conviction, five to fifteen years each for the second-degree CSC and third-degree CSC convictions, one to two years for the fourth-degree CSC conviction, and two to fifteen years for each assault conviction. He appeals as of right. We affirm defendant's convictions and sentences, but remand for correction of the sentencing guidelines score for OV 9.

I. Basic Facts

Defendant, age forty-two at the time of trial, was convicted of sexually assaulting his stepdaughter, LB,[2] age nineteen at the time of trial, his niece, AP, age fourteen at the time of trial, and a neighbor, EB, age seventeen at the time of trial. According to LB, defendant sexually abused her on numerous occasions until about two months before she moved out of the house at age seventeen. LB explained that all of the sexual assaults occurred at night and that she always feigned sleeping during them. LB testified that, beginning in 1998 or 1999, when she was eleven

[1] Defendant was acquitted of two additional counts of second-degree CSC.

[2] Defendant adopted LB when she was eight years old.

or twelve years old, defendant began "dry humping" her.[3] LB explained that defendant assaulted her in this manner up to four times a week, with each act lasting ten to twenty minutes. "Around a year later," when LB was thirteen years old, defendant began touching her bare breasts in a "circular motion" and later graduated to "sucking" her nipples up to four times a week. Defendant would sometimes return to "dry humping" after fondling her breasts. When LB was fifteen years old, defendant began digitally penetrating her vagina with two fingers for five to ten minutes each time. She indicated that when she was sixteen and seventeen, defendant assaulted her about once or twice a week. LB indicated that the last incident occurred in 2003 and involved defendant rubbing her vagina. LB moved out of the house in March 2003, primarily because she and her mother were not getting along.[4]

EB, who lived next door to defendant, was a friend of LB's younger sister, JB, and often slept at defendant's house. According to EB, on March 30, 2003, when she was fifteen years old, she fell asleep on the living room floor and was awakened at about 3:30 a.m. by defendant, who was "on top of her" "jirating" [sic] his "pelvic area" "up and down" on her "butt." Defendant claimed that he was fixing EB's blanket and left the room. EB testified that she left the house and arrived home at about 4:00 a.m. and told her mother what had occurred.

AP is defendant's wife's niece. AP testified that she spent the night at defendant's house about twice a month because she was a good friend of defendant's thirteen-year-old biological daughter, RB. According to AP, in July 2003, when she was twelve years old, she was asleep on a couch covered by a blanket. When she woke up, her blanket was on the floor, and defendant was "on top of her" "doing like a humping motion" moving "his private part" "[u]p and down." AP told defendant to "get away from her" and defendant left the house "shortly after that." AP went in a bathroom and called her mother to pick her up at approximately 6:30 a.m. AP left the house ten to fifteen minutes later. AP's mother testified that defendant called their house at 10:00 a.m. and said that AP may have been ill from a pizza they had eaten, from watching a scary movie, or from having a bad dream. AP testified that before that incident, two other incidents occurred when she was between eight and ten years old. AP explained that on one occasion while she was on the living room couch, defendant tickled her on her stomach and then rubbed his penis against her "butt" for about five minutes. About a month later, AP was on the floor and defendant put his hand down her pants and "started tickling" her "butt" and "her private part." AP did not initially report those incidents to her mother.

At trial, defendant testified on his own behalf and denied ever inappropriately touching any of the victims. The defense presented several defense witnesses, including defendant's wife, former wife, two sons, and father-in-law, who all denied seeing defendant act inappropriately with any of the victims and testified regarding defendant's character for honesty. The defense also called the police detectives who took the initial complaints from the victims.

[3] LB described "dry humping" as defendant's moving his pelvis area against her pelvis area to simulate sexual acts while clothed.

[4] LB initially lived with a friend and later lived with her aunt, AP's mother.

II. Expert Testimony

Defendant first argues that the trial court erred in denying his motion for a mistrial after Amy Allen, who was qualified as an expert in child sexual abuse and had interviewed AP only, implicitly vouched for AP's credibility. We disagree.

Allen is a social worker for Care House, which is a child abuse and neglect organization in Oakland County. During direct examination, Allen testified about the creation, purpose, and use of the forensic interview protocol and about the general characteristics and behavior of child victims of sexual abuse, based on relevant research and literature. During defense counsel's cross-examination of Allen, Allen acknowledged that she could not opine whether the allegations in this case were true. The following exchange also occurred regarding forensic interviewing and Allen's opinion regarding the general characteristics and behavior of child victims of sexual abuse:

> *Q*. There is no - I'm going to ask some obvious - there's no physical testing?
>
> *A*. No.
>
> *Q*. There's no lie detector, polygraph testing? There's no objective testing that takes place in any fashion?
>
> *A*. The [forensic interviewing] protocol is objective but it's not testing, correct.
>
> *Q*. It's not testing, okay. There's nothing to stop a teenager from coming in, going through this process, and maintaining a lie throughout it, true?
>
> *A*. Correct.
>
> *Q*. I mean, because what you've been telling us is what basically happens is a trained expert such as yourself has a dialog [sic] with a lay person child, is that right?
>
> *A*. Yes.
>
> * * *
>
> *Q*. Nothing more than words?
>
> *A*. Correct.

On redirect examination, the prosecutor asked Allen about the studies she had relied on in forming her opinion regarding the characteristics of child victims of sexual abuse and asked whether those studies were based on confirmed cases of abuse. Allen responded that the research referred to substantiated cases. The following exchange then occurred:

> *Q*. In your experience and professional work have you seen children who have exhibited some of the reasons for delayed disclosure that you talked about today?

A. Yes.

Q. Okay, and those were with confirmed cases, correct?

Defense counsel objected. Following a sidebar, the trial court instructed the jury to disregard the question and informed them that the attorneys' questions are not evidence. The following exchange then occurred between the prosecutor and Allen:

Q. Is your purpose of doing these interviews is [sic] to determine the veracity of the statement that children give?

A. Some - yes, somewhat, yes.

Defense counsel objected. Outside the presence of the jury, defense counsel stated that the prosecutor may attempt to argue that he opened the door for such questioning. The trial court interjected, stating: "I don't understand the last question either, is it part of her job to determine the truth. I think we want to stay away from that, that's the jury's decision . . . ." The prosecutor argued that defense counsel had opened the door by asking about whether there were any tests or lie detectors. Defense counsel requested a mistrial.[5] The prosecutor noted that Allen had not testified that she believed AP. The trial court directed the prosecutor to "stay away from that [line of questioning]," and the prosecutor agreed to do so. The trial court denied defendant's motion for a mistrial, but indicated that it would instruct the jury to strike the question and answer and would consider providing a special jury instruction. Defense counsel requested that the court instruct the jury that "whether this is true or not is their decision." The jurors returned, and the trial court told them that "the last question asked by the prosecutor and the answer that was given by this witness are stricken from the record." Defendant now argues that the court's instruction was insufficient and that he was entitled to a mistrial.

This Court reviews a trial court's ruling on a motion for a mistrial for an abuse of discretion. *People v Griffin*, 235 Mich App 27, 36; 597 NW2d 176 (1999). "A mistrial should be granted only for an irregularity that is prejudicial to the rights of the defendant and impairs his ability to get a fair trial." *Id*. (citation and quotation marks omitted).

In child sexual abuse cases, "(1) an expert may not testify that the sexual abuse occurred, (2) an expert may not vouch for the veracity of a victim, and (3) an expert may not testify whether the defendant is guilty." *People v Peterson*, 450 Mich 349, 352; 537 NW2d 857, amended 450 Mich 1212 (1995). "[T]he jury in these credibility contests is looking 'to hang its hat' on the testimony of witnesses it views as impartial." *Id.* at 376. It is the province of the jury to assess the credibility of witnesses. See *People v Barclay*, 208 Mich App 670, 676; 528 NW2d 842 (1995)

[5] In requesting the mistrial, defense counsel stated: "I realize it's only one comment and I doubt the [c]ourt will grant it, I understand, but she's now impliedly said that she believes this, and that's what we tried to stay away from."

On this record, we cannot find that the trial court's decision to deny defendant's motion for a mistrial was an abuse of discretion. To the extent that the challenged question and answer could be construed as Allen's implicitly offering an opinion regarding AP's credibility, a mistrial was not required. The challenged testimony was a relatively small portion of Allen's extensive testimony. Allen testified, at length, regarding the general characters and behavior of sexually abused children, which was not improper. *Peterson*, *supra* at 352-353. Allen expressly admitted that she could not testify about the credibility of AP's allegations and confirmed that such a determination is not the purpose of forensic interviewing. During defense counsel's cross-examination of Allen, the following exchange occurred:

> *Q*. You are not saying in this present case in any way shape or form that the allegations that are being made here are true or false?
>
> *A*. That's correct.
>
> *Q*. That's not part of your expertise and part of what you've been asked to testify about, is that correct?
>
> *A*. Correct.
>
> *Q*. You're not here to say that these things likely happened or didn't but you're testifying about the literature and your experience of child sexual abuse, is that true?
>
> *A*. Correct.
>
> * * *
>
> *Q*. And specifically you are not saying that any of these individual girls that have been - teenagers that have testified their allegations are true or false, that's not something that you're testifying to here today?
>
> *A*. Correct.
>
> *Q*. Including [AP] who [sic] you had a chance to interview at the forensic interview which was conducted?
>
> *A*. Correct.

Moreover, as previously indicated, the trial court immediately instructed the jury to disregard the challenged question and answer. In its final instructions, the trial court again instructed the jurors that the lawyers' questions are not evidence and that it was their job to determine the credibility of the witnesses and the facts of the case. The court instructed the jurors regarding the purpose of expert testimony and indicated that they did not "have to believe" Allen's testimony. The court also reminded the jurors of their oath to return a verdict based only on the evidence and the court's instructions on the law. It stated:

> At times during trial I've excluded evidence that was offered or stricken testimony that was heard. Please do not consider those things in deciding the

> case. Make your decision only on the evidence allow [sic] in and nothing else . . . . To repeat once more, . . . you must decide this case only on the evidence that was admitted during trial.

"Jurors are presumed to follow their instructions, and instructions are presumed to cure most errors." *People v Abraham*, 256 Mich App 265, 279; 662 NW2d 836 (2003). The record supports that the jury followed its instructions. As previously indicated, Allen interviewed only AP. Defendant was charged with three offenses involving AP (assault with intent to commit second-degree CSC and two counts of second-degree CSC). The jury acquitted defendant of the two counts of second-degree CSC involving AP. Defendant is not entitled to a new trial.

Defendant also challenges portions of Allen's testimony in which defendant claims that she "implicitly vouched for the allegations" and implied "that a case is referred for criminal prosecution only if she determines that the allegations are true," "that Care House weeds out unreliable allegations and proceeds only with verifiable cases," and "that a case proceeds only if she is convinced that no alternative hypothesis is as credible as the allegation of sexual abuse." Defendant did not object to this testimony below. Consequently, we review this claim for plain error affecting substantial rights. *People v Carines*, 460 Mich 750, 752-753, 763-764; 597 NW2d 130 (1999).

We have reviewed the challenged testimony and conclude that defendant has not demonstrated a plain error affecting his substantial rights. Allen repeatedly acknowledged that there could be false allegations of sexual abuse despite forensic interviewing and that she was not offering an opinion on the veracity of the allegations made in this case. Further, in discussing forensic interviewing protocol, Allen testified that the purpose is not to determine the guilt of a suspect and that use of the protocol does not indicate a decision regarding the veracity of the allegations. Allen explained that the interviews are set up and conducted, and thereafter "[Care House] create[s] an opportunity for the investigators to meet with each other and a multi-disciplinary team to work their investigation hand-in-hand," enabling "Children's Protective Services and law enforcement to reach an outcome that either is moved forward for criminal prosecution or not." Allen indicated that she does not investigate cases and that children are referred to Care House by protective services investigators or law enforcement. Allen acknowledged that children can be mistaken about the sexual nature of touching, can be coached, or can have motives to make false allegations.

In sum, having reviewed Allen's testimony in its entirety, we conclude that defendant has not demonstrated either a plain error or shown that his substantial rights were affected. *Carines, supra* at 763. Moreover, it is highly unlikely that the testimony emphasized by defendant caused the jury to convict an otherwise innocent person. *Id*.

III. Prosecutorial Misconduct

Next, defendant argues that he was denied a fair trial by several instances of prosecutorial misconduct. We disagree.

Because defendant failed to object to the prosecutor's conduct, we review this claim for plain error affecting substantial rights. *Id*. "No error requiring reversal will be found if the prejudicial effect of the prosecutor's conduct could have been cured by a timely instruction."

People v Schutte, 240 Mich App 713, 721; 613 NW2d 370 (2000), abrogated in part on other grounds in *Crawford v Washington*, 541 US 36; 124 S Ct 1354; 158 L Ed 2d 177 (2004).

Defendant claims that in the following comment made during closing argument, the prosecutor impermissibly argued facts not in evidence when he stated that defendant had "the history" to commit the offenses. The prosecutor stated:

> Defendant corroborated all the versions of what the victims had to say with the exception of the touching, and we know he wasn't going to get up here and say that. Defendant had the opportunity, the desire and *the history* to commit these crimes. [Emphasis added.]

A prosecutor may not make a statement of fact to the jury that is unsupported by the evidence. *People v Stanaway*, 446 Mich 643, 686; 521 NW2d 557 (1994). Because there was no evidence to support an inference that defendant had a history of sexual misconduct, the remark was improper. However, viewed in the context of the complete closing and rebuttal arguments, the prosecutor's remark did not affect defendant's substantial rights. The remark involved only a brief portion of the prosecutor's arguments, was of comparatively minor importance considering the totality of the evidence against defendant, and was not so inflammatory that defendant was prejudiced. Moreover, any prejudice that may have resulted could have been cured by a timely instruction. *Schutte, supra* at 721. The trial court instructed the jurors that the lawyers' comments are not evidence and that the case should be decided on the basis of the evidence. The instructions were sufficient to dispel any possible prejudice. *People v Long*, 246 Mich App 582, 588; 633 NW2d 843 (2001), lv den 465 Mich 952 (2002).

Defendant argues that, in the following excerpts from closing arguments, the prosecutor impermissibly mischaracterized the evidence by stating that the victims' testimony was uncontradicted, thereby disparaging defendant's testimony, which contradicted the victims' testimony:

> And you also heard from [LB] who is the [d]efendant's adopted daughter. And she testified in a manner that was consistent that *wasn't contradicted by anyone*. What they did instead of coming in and contradicting what she said they came in and slammed her. They did everything. [Emphasis added.]
>
> * * *
>
> And yes it's a lie, but you know what there's nothing that shows any evidence that [LB] was making this up, that she's lying about what happened.
>
> * * *
>
> You're also going to hear, the Judge will instruct you, that it's not necessary that you have any other evidence beyond what the girls have said. I don't have to give you any other evidence provided you believe these girls beyond a reasonable doubt. As there's no reason to question what they have to say because they have been consistent, they have been resolute in their testimony and *there's nothing to contradict what they said.* [Emphasis added.]

Viewed in context, the prosecutor's argument was not improper. Through a partial and selective recitation of the record, defendant has mischaracterized the prosecutor's argument. Viewed in context, it is clear that the prosecutor was asserting that, apart from the defense witnesses' testimony, there was no evidence that contradicted the victims' testimony. Immediately after making the first comment, the prosecutor stated that the defense witnesses "called [LB] a liar," and claimed that she was "making up these allegations." He noted that the only people who knew what happened in each instance were defendant and the involved victim and that the evidence supported the victims' testimony. The prosecutor discussed the evidence, urged the jurors to evaluate the evidence, and argued that despite "being called a liar," there were reasons to conclude that LB was credible, such as her demeanor on the witness stand, and that LB and the other victims were consistent throughout the proceedings. Additionally, in rebuttal argument, the prosecutor specifically stated that defendant testified and denied the allegations and argued why the evidence did not support his testimony. At any rate, to the extent that the prosecutor's remarks could be considered improper, the trial court's instructions that lawyers' comments are not evidence and that the jury was to decide the case on the basis of the properly admitted evidence were sufficient to dispel any possible prejudice. *Long*, *supra* at 588. Consequently, this claim does not warrant reversal.

Defendant also argues that in the above remarks, the prosecutor impermissibly shifted the burden of proof by implying that defendant had an obligation to contradict the evidence. Although a prosecutor may not imply that a defendant must prove something or present a reasonable explanation, see *People v Guenther*, 188 Mich App 174, 180; 469 NW2d 59 (1991), here the prosecutor's argument did not shift the burden of proof. Rather, viewed in context, the prosecutor discussed the evidence and argued that the victims were credible. See *People v Fisher*, 220 Mich App 133, 156; 559 NW2d 318 (1996) ("a prosecutor is free to argue the evidence and all reasonable inferences from the evidence as it relates to the prosecution's theory of the case"). Moreover, to the extent that the challenged remarks could be viewed as improper, the trial court's instructions that defendant did not have to offer any evidence or prove his innocence, and that the prosecution was required to prove the elements of the crimes beyond a reasonable doubt, were sufficient to cure any possible prejudice. *Long*, *supra* at 588. Therefore, this unpreserved claim does not warrant reversal.

IV. Hearsay

Defendant argues that he was denied a fair trial by the admission of statements made by AP and EB to their mothers after the alleged sexual assaults. We disagree. Because defendant did not object to the testimony below, we review this claim for plain error affecting substantial rights. *Carines*, *supra* at 763.

Hearsay, which is a statement other than one made by the declarant while testifying at a trial or hearing, offered to prove the truth of the matter asserted, is inadmissible at trial unless there is a specific exception allowing its introduction. See MRE 801 and 802. The excited utterance exception permits the admission of statements that (1) arise out of a startling event and (2) are made while the declarant was under the excitement caused by that event. See MRE 803(2) and *People v Layher*, 238 Mich App 573, 582; 607 NW2d 91 (1999). The focus of the excited utterance rule is the "lack of capacity to fabricate, not the lack of time to fabricate," and the relevant inquiry is one concerning "the possibility for conscious reflection." *People v Smith*, 456 Mich 543, 551; 581 NW2d 654 (1998). The length of time between the startling event and

the statement is an important factor to consider in determining admissibility, but it is not dispositive. *Id*. Rather, the key question is whether the declarant was still under the stress of the event, and the trial court is accorded wide discretion in making that preliminary factual determination. *Id.* at 551-552.

Here, defendant essentially asserts that too much time elapsed between the alleged incidents and when AP and EB told their respective mothers that they had been sexually assaulted. The evidence illustrates that both victims' statements were made after a startling event, i.e., a sexual assault. Consequently, the question is whether the victims were still under the overwhelming influence of the event while each made the statement to her mother. *Id*.

There was evidence that AP, who was twelve years old at the time, called her mother from defendant's house shortly after the incident and requested that she "hurry up" and pick her up. AP testified that she was nervous and scared, and AP's mother indicated that AP was whispering and sounded scared and "panicked." AP's mother received the call at approximately 6:30 a.m. and arrived between ten and fifteen minutes later. AP's mother testified that AP was crying, looked "really shook up," and was "sort of grasping [sic]" for air. AP's mother asked AP what was wrong, and AP told her "just to go." After driving "off of defendant's street," AP told her mother that defendant was "over top of her doing a humping motion." When AP and her mother arrived home, AP gave her more details. AP was still scared and crying at that time.

EB, who was fifteen years old at the time, testified that she left defendant's house at about 4:00 a.m., immediately after the incident, and went home. EB testified that she was "very, very scared." EB went into her room for "a few minutes" and then went into her mother's room. EB's mother testified that at approximately 4:30 a.m., EB woke her and appeared upset. After "five, ten minutes," EB told her mother that defendant "was on top of her." EB testified that she was crying, scared, and "very upset" when she told her mother. EB's mother described EB as "pretty upset and crying."

Despite the passage of time before each victim made the statements to their respective mothers, the evidence showed that both were still under the stress caused by the events.[6] Because it is not plainly apparent that the challenged testimony could not have been received successfully and correctly under MRE 803(2), defendant has failed to demonstrate a plain error. Therefore, defendant is not entitled to appellate relief.

V. Ineffective Assistance of Counsel

We reject defendant's claim that defense counsel was ineffective for failing to object to the unpreserved claims of errors discussed in parts III and IV. Because defendant failed to raise this issue in the trial court in connection with a motion for a new trial or an evidentiary hearing,

[6] In *Smith*, *supra* at 552, our Supreme Court held that a sexual-assault victim's statement, made over ten hours later in response to questioning by the victim's mother, was an excited utterance where the evidence showed that the victim "was still under the overwhelming influence of the assault."

this Court's review is limited to mistakes apparent on the record. *People v Sabin (On Second Remand)*, 242 Mich App 656, 658-659; 620 NW2d 19 (2000).[7]

"Effective assistance of counsel is presumed, and the defendant bears a heavy burden of proving otherwise." *People v Effinger*, 212 Mich App 67, 69; 536 NW2d 809 (1995). To establish ineffective assistance of counsel, a defendant must show that counsel's performance was below an objective standard of reasonableness under prevailing norms and that the representation so prejudiced the defendant that there is a reasonable probability that, but for counsel's error, the result of the proceedings would have been different. *Id.*

In light of our conclusion that the claimed errors in parts III and IV did not affect defendant's substantial rights, i.e., were not prejudicial, defendant cannot demonstrate that there is a reasonable probability that, but for counsel's inaction, the result of the proceedings would have been different. *Id*. Therefore, he cannot establish a claim of ineffective assistance of counsel. Defendant is not entitled to a new trial.

VI. Sentence

A. *Blakely v Washington*

We reject defendant's claim that he must be resentenced because the trial court's factual findings supporting its scoring of the offense variables were not determined by a jury, contrary to *Blakely v Washington*, 542 US 296; 124 S Ct 2531; 159 L Ed 2d 403 (2004). In *Blakely*, the United States Supreme Court struck down as violative of the Sixth Amendment a determinate sentencing scheme in which the sentencing judge was allowed to increase the defendant's maximum sentence on the basis of facts that were not reflected in the jury's verdict or admitted by the defendant. Our Supreme Court has determined that *Blakely* does not apply to Michigan's indeterminate sentencing scheme. *People v Drohan*, 475 Mich 140, 142-143; 715 NW2d 778 (2006); *People v Claypool*, 470 Mich 715, 730 n 14; 684 NW2d 278 (2004).

B. Scoring of Offense Variables

Defendant also argues that the trial court abused its discretion in scoring offense variables 9 and 11 of the sentencing guidelines. Defendant did not object below to the scoring of OV 9 and 11. A party shall not raise on appeal an issue challenging the scoring of the sentencing guidelines unless the party has raised the issue at sentencing, in a proper motion for resentencing, or in a proper motion to remand filed in the court of appeals. *People v Kimble*, 470 Mich 305, 309; 684 NW2d 669 (2004); MCL 769.34(10). However, plain error in the scoring of the guidelines can be raised and corrected on appeal where "the trial court's error resulted in a sentence that was not within the appropriate legislative guidelines range." *People v Kimble*, 252 Mich App 269, 276 n 5; 651 NW2d 798 (2002). This issue may also be reviewed in the context of defendant's claim that defense counsel was ineffective for failing to object to the scoring of OV 9 and 11. *People v Francisco*, 474 Mich 82, 89 n 8; 711 NW2d 44 (2006); MCL 769.34(10).

[7] We note that defendant's earlier motion for remand filed with this Court has been denied.

"A sentencing court has discretion in determining the number of points to be scored, provided that evidence of record adequately supports a particular score." *People v Endres*, 269 Mich App 414, 417; 711 NW2d 398 (2006). A scoring decision "for which there is any evidence in support will be upheld." *Id*.

1. OV 9

MCL 777.39 provides for a score of 0 for OV 9 if there are fewer than two victims, and a score of 10 if there are two to nine victims. The instructions state that "each person who was placed in danger of injury or loss of life" is counted as a victim. MCL 777.39(2)(a). We agree with defendant that OV 9 should have been scored at 0 because there is no evidence that anyone other than LB was present at the time of the commission of the first-degree CSC involving LB. In a sentencing memorandum, the prosecutor argued that "[s]ince the Defendant was found guilty of sexually molesting three separate girls he should receive 10 points on OV 9." However, OV 9 should be scored only with respect to the specific transaction that gave rise to the particular conviction for which a sentence is being imposed. See *People v Chesebro*, 206 Mich App 468, 470; 522 NW2d 677 (1994). Consequently, OV 9 should not have been scored at 10 points, and defense counsel should have objected to the trial court's scoring of OV 9.

If OV 9 is correctly scored at 0, defendant's total OV score decreases from 110 to 100 points. With the corrected OV total, defendant remains in the highest OV level (i.e., level VI for 100+ points), and his properly scored guidelines range remains the same (i.e., 135 to 225 months). "Where a scoring error does not alter the appropriate guidelines range, resentencing is not required." *Francisco*, *supra* at 89 n 8. Consequently, defense counsel's failure to object to the scoring of 10 points for OV 9 did not affect the outcome of the proceedings, and defendant cannot establish a claim of ineffective assistance of counsel. *Effinger*, *supra* at 69.

Although we will not disturb defendant's sentences because they are within the appropriate guidelines range, we reverse the trial court's scoring of OV 9 and remand for correction of defendant's guidelines score. See *People v Melton*, 271 Mich App 590, 596; 722 NW2d 698 (2006).

2. OV 11

MCL 777.41(1)(a) provides for a score of 50 points if "two or more criminal sexual penetrations occurred." The instructions for OV 11 provide that "all sexual penetrations of the victim by the offender arising out of the sentencing offense" should be scored.[8] MCL

[8] In *People v Johnson*, 474 Mich 96, 100-101; 712 NW2d 703 (2006), the Supreme Court explained:

> [W]e have previously defined "arising out of" to suggest a causal connection between two events of a sort that is more than incidental. We continue to believe that this sets forth the most reasonable definition of "arising out of." Something that "aris[es] out of," or springs from or results from something else, has a connective relationship, a cause and effect relationship, of more than an incidental

(continued…)

777.41(2)(a). The information charged defendant with one count of first-degree CSC involving LB, and alleged a timeframe of January 2000. Only one sexual penetration was required to form the basis of the first-degree CSC conviction, but LB testified that during the assaults involving penetration, defendant would insert two fingers or "one a couple of times" in her vagina and move "in and out" for five to ten minutes. This evidence supports the trial court's score of 50 points for OV 11.[9] Because there was no basis for an objection, defendant cannot establish a claim of ineffective assistance of counsel. See *People v Snider*, 239 Mich App 393, 425; 608 NW2d 502 (2000) (counsel is not required to make a futile objection).

Affirmed, but remanded for correction of defendant's guidelines score for OV 9. We do not retain jurisdiction.

/s/ Mark J. Cavanagh
/s/ William B. Murphy
/s/ Patrick M. Meter

(…continued)

> sort with the event out of which it has arisen. For present purposes, this requires that there be such a relationship between the penetrations at issue and the sentencing offenses.

[9] In his reply brief, defendant acknowledges LB's testimony that defendant would move "in and out" but argues that it "takes a Herculean effort" to find that this movement constituted "re-penetrati[on]." However, defendant's argument would require this Court to ignore or interpret LB's express testimony. Further, as indicated previously, a scoring decision "for which there is any evidence in support will be upheld." *Endres*, *supra* at 417.